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NOTE AND COMMENT

POWER OF MUNICIPAL CORPORATIONS TO GRANT EXCLUSIVE PRIVILEGES.—The rapid development of the law due to the ever increasing number and importance of public service corporations has given rise to many interesting questions of vital importance to both the corporations and the municipalities, and has left it in many respects in an uncertain and unsettled condition. Because of the fact that cases involving the question indicated in the heading often go off on constitutional grounds, two very recent decisions by the United States Supreme Court, *Vicksburg* v. *Vicksburg Waterworks Company*, 202 U. S. 453, 26 Sup. Ct. Rep. 660, decided in 1906, and *Water, Light & Gas Company* v. *City of Hutchinson*, 207 U. S. 583, 28 Sup. Ct. Rep. 135, decided Dec. 23, 1907, are especially worthy of note.

In the *Vicksburg case* the facts briefly stated were as follows: The city of Vicksburg, Miss., with the usual general authority to supply itself and inhabitants with water and to enter into contracts with reference thereto, executed a contract with the water company's assignors whereby they were to furnish the city with water, the city on its part contracting "that in consideration of the public benefit to be derived therefrom the

exclusive right and privilege is hereby granted for a period of thirty (30) years * * * of erecting, maintaining and operating a system of waterworks," etc. (*Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65, 69). Later the Mississippi legislature passed an act authorizing municipal corporations within the state to establish municipal water plants for the purpose of furnishing themselves and inhabitants with water for public and domestic purposes. Pursuant to authority granted by this act, the city council of Vicksburg enacted an ordinance for the establishment of such a plant, whereupon the water company instituted suit in the United States Circuit Court to enjoin the city from proceeding further, claiming that this last ordinance and the proceedings about to be taken thereunder interfered with its exclusive right and impaired the obligation of its contract with the city. The circuit court allowed the injunction, which order upon appeal to the supreme court was affirmed. 5 MICH. LAW REV. 42.

In the *Hutchinson case* the complainant company had acquired from its assignors rights under a certain contract made with the defendant city, whose authority from the state was of the same general nature as that of Vicksburg. The contract in terms granted them "the exclusive right and privilege for the term of twenty years from the date of the passage and approval of this ordinance (No. 402), of supplying the city of Hutchinson, Reno county, Kan., and the inhabitants thereof, by a system of waterworks with water * * *, with electric current for electric light and power," etc. That the contract conferred, or purported to confer, an exclusive right or privilege cannot be denied, and the supreme court so considered it in its opinion. In 1905, some years after the date of the contract referred to and after the company had expended considerable sums of money in improvements, etc., on the strength of its supposed exclusive right, the city council, by its ordinance No. 651, granted to certain other parties the right to construct and operate a street railway and to construct and operate electric and gas plants for the purposes for which electricity and gas may be used. Thereupon the complainant brought suit in the United States Circuit Court to restrain the city and the grantees of the right under ordinance No. 651 from interfering with its exclusive rights, basing its claim upon the same grounds that were urged in the *Vicksburg case.* The court refused to grant the injunction for the reason that the city of Hutchinson had no authority, under the charter and the laws of Kansas, to grant an exclusive right or privilege such as it had purported to give complainant. 144 Fed. 256, 5 MICH. LAW REV. 136. On appeal to the supreme court the decree of the lower court was affirmed.

It will thus be seen that in these two cases, in which the decrees of the supreme court were exactly opposite, the only difference in the facts out of which they arose was that in the one it was a thirty-year exclusive franchise to furnish water, which was violated by the city attempting to establish a municipal water plant, while in the other case the franchise was for twenty years, violated by the city attempting to grant the right to furnish electricity to the city and its inhabitants to a new company. Neither the difference in time nor the fact that in one case it was a water supply that

was involved, while in the other it was electricity, seemed to influence the court in arriving at its conclusions, thus leaving as the only real distinguishing feature the fact that in the *Vicksburg case* it was the city itself that attempted to establish a competing plant, while in the *Hutchinson case* the city, instead of putting in its own plant, granted that right to third parties.

At first blush the two cases seem to be almost squarely in conflict, but a careful analysis of the opinions and facts upon which they were based shows possible grounds of distinction. It is the purpose of this note to point out and briefly discuss those grounds, together with a consideration of the principles involved and the cases relative thereto with especial reference to the decision of the United States Supreme Court.

Municipal and public corporations are creatures of the state, created primarily for the purpose of enabling the state to more adequately administer its governmental functions and duties, and as such they act as agents of the state. As such agents they have no powers except those granted by the charter or the general law in express terms or by necessary implication. In the case of the municipal corporation there is the additional feature that to a certain extent its creation is for the benefit of the people within its limits, but that fact does not confer upon them any wider powers. As between the state and the municipality any doubt as to the construction of powers granted, is resolved in favor of the state, the interest of the public at large being in theory considered as superior to that of any portion thereof. *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.*, 171 U. S. 48, 43 L. Ed. 67; 18 Sup. Ct. Rep. 732. While as between the municipality and an individual or private corporation any doubt as to the construction of the extent of any power or right granted by the city, is resolved in favor of the city, the interest of a portion of the public being considered as of paramount importance to that of any individual or private corporation. *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; *Freeport Water Co.* v. *Freeport*, 180 U. S. 598, 45 L. Ed. 688, 21 Sup. Ct. Rep. 497; *Joplin* v. *Southwest Missouri Light Co.*, 191 U. S. 150, 48 L. Ed. 127, 24 Sup. Ct. Rep. 43, *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 48 L. Ed. 217, 24 Sup. Ct. Rep. 82. In the early and leading case of *Charles River Bridge* v. *The Warren Bridge*, 11 Pet. 422, the rule was stated by Mr. CHIEF JUSTICE TANEY to be that no grant by the *legislature* to a private corporation or individual would be considered as exclusive unless granted in the clearest express terms, and that every doubt would be resolved against the individual and in favor of the public. The principle of this case has since been reaffirmed in a multitude of cases. So had the legislatures of Mississippi and Kansas made the contracts directly with the water companies, instead of making them through their agents, the cities of Vicksburg and Hutchinson, such contracts would not have been construed as granting exclusive rights unless so expressed in the most unequivocal terms. Still in the *Vicksburg case* the court held that a contract by the city granting an exclusive right was valid (for otherwise the city would not have been barred from erecting its plant), thus necessarily holding that the city had such authority from the state.

But its authority from the state was in mere general terms, there being no express power given to confer exclusive rights. In reaching its conclusion it is apparent that the court went squarely contrary to the settled rules of construction, and held in effect that what the state could not do directly it could do indirectly through its agent.

It may be answered to this objection that the power to make such a contract was given Vicksburg by necessary implication, that it could not exercise the powers expressly granted except in that manner. But the court did not put its decision on that ground, and in the *Hutchinson case* it concluded that such a contract was not necessarily the only manner in which the city's express powers could be exercised. The only case which it has been possible to find holding that such a contract was necessary to the execution of the powers conferred is *Atlantic City Waterworks Co.* v. *Atlantic City,* 39 N. J. Eq. 367.

It would seem, therefore, that in the *Vicksburg case* the supreme court must have found the contract between the city and the water company to be valid, as otherwise the city would not have been prevented from establishing its own plant, there being no contention that there was anything besides the contract that prevented it.

In the cases in which the supreme court has been called upon to consider the question it has held that a municipal or public corporation cannot grant an exclusive franchise without express authority from the state so to do. *Minturn* v. *LaRue,* 23 How. 435; *Wright* v. *Nagle,* 101 U. S. 791.

In *Minturn* v. *LaRue* the city of Oakland, which had general authority by its charter to establish and regulate ferries, granted to the complainant the exclusive right of operating a line of ferries between that city and San Francisco. Later the defendant undertook to run a competing line. The object of this action was to secure an injunction restraining the defendant from interfering with the complainant's exclusive right. The question whether, under the power conferred upon the city, it had authority to grant the exclusive right which it purported to have done was squarely presented. In holding that the city had not such authority, the court, by Mr. Justice NELSON, said (page 436): "It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities."

In *Wright* v. *Nagle* the Inferior Court, which under the statutes of Georgia had authority to establish and regulate ferries and bridges, gave to complainants what in terms amounted to an exclusive right to maintain toll bridges within certain limits. Later the commissioners of roads and revenue for the county authorized the defendant to erect and maintain a bridge within the limits of the grant to complainants, who thereupon applied for an in-

junction to restrain the interference with their exclusive right. The lower court and the Georgia Supreme Court held that the grant to complainants did purport to be exclusive, but that the Inferior Court had not the power under the general authority conferred upon it to grant an exclusive right to erect and maintain toll bridges, and so refused the injunction. On appeal to the United States Supreme Court the decision was affirmed.

In the other federal courts and in the state courts, almost without exception, the rule seems to be to the same effect as announced in *Minturn* v. *LaRue* and *Wright* v. *Nagle*. See *Jackson County Horse R. Co.* v. *Interstate Rapid Transit Co.*, 24 Fed. 306; *Saginaw Gas Light Co.* v. *City of Saginaw*, 28 Fed. 529; *Grand Rapids E. L. & P. Co.* v. *Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. 659; *The Westerly Waterworks Co.* v. *Town of Westerly*, 80 Fed. 611; *Norwich Gas-Light Co.* v. *Norwich City Gas Co.*, 25 Conn. 19; *Gale* v. *Village of Kalamazoo*, 23 Mich. 344 (opinion by COOLEY, J.); *Logan & Sons* v. *Pyne*, 43 Iowa 524; *Long* v. *City of Duluth*, 49 Minn. 280; *Davenport* v. *Kleinschmidt*, 6 Mont. 502; *State* v. *Cincinnati Gas-Light & Coke Co.*, 18 Oh. St. 262; *Altgeld* v. *City of San Antonio*, 81 Tex. 436; *Syracuse Water Co.* v. *City of Syracuse*, 116 N. Y. 167.

The decision in the *Vicksburg case*, as appears from the opinion of Mr. JUSTICE DAY, was based upon the decision of the same court in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77. But, as pointed out in 5 MICH. LAW REV. 42, the facts in the two cases were not at all the same. In the *Walla Walla case* the city had granted the water company a franchise to furnish water for public and domestic purposes, the city agreeing on its part that "the city of Walla Walla shall not erect, maintain or become interested in any waterworks except the ones herein referred to," etc. Subsequently the city attempted to establish a municipal plant, and an injunction restraining the city from violating its contract was granted. But in that case there was involved no question of the validity of an exclusive grant, the only question considered being whether the city could contract to exclude *itself* from competing, and the decision of the court went only to the extent of holding that a contract such as the city had there made was valid. The contract being valid, of course the city was properly enjoined. In the *Vicksburg case* the contract attempted to do more than merely exclude the city itself from competition; it purported to create an absolutely exclusive franchise—in other words, a monopoly. In the *Hutchinson case* the court, in line with what is manifestly the overwhelming weight of authority in the other courts and its own decisions prior to the *Vicksburg case*, held that such a contract was ultra vires. It being ultra vires on grounds of public policy, the contract was void. If such a contract really is ultra vires, is it not a rather startling proposition to hold that by it a municipality can bar *itself* from establishing a plant of its own and thus destroy the monopoly, and still at the same time and under the same contract is not prevented from granting the privilege to a third party and thus indirectly accomplish the same purpose? Yet that is exactly the condition in which the law is left by the decisions in the *Vicksburg* and *Hutchinson cases*.

There are two reasons given for holding these exclusive privilege con-

tracts void, first, because the city has no authority from the state to enter into such contracts; and, second, because a monopoly is thereby created, and monopolies are odious. However, since the primary reason for holding that cities have no such authority is that a monopoly is created, the creation of which is possible only by the clearest terms and since the city has only such power as is given it, it is apparent that the two reasons really amount to but one, and that, the law's aversion to monopolies. In practically every instance in which a city has granted such an exclusive right and then attempts to grant a new franchise to other parties or to establish a plant of its own, it is self evident that the object is the betterment of conditions caused by the monopoly. Nor does it require judicial expression to establish the fact that in villages and cities of comparatively small size, where there are public service corporations already in operation, it is next to impossible to induce private capital to enter into competition. In such cases, unless the municipality can install its own plant, the established companies have, in effect, as complete and secure a monopoly as they would have were their contracts purporting to give them their exclusive rights held valid and binding. In view of the large number of exclusive franchises which our municipalities have purported to give and the ever increasing popularity and demand for municipal ownership of public service enterprises, it is, indeed, much to be desired that the supreme court will not feel inclined to follow its decision in the *Vicksburg case.*

In the opinion of the court in the *Hutchinson case* in distinguishing that case from the *Vicksburg case,* besides the difference in the facts, there was given one other ground, stated by the court as follows: "In the *Vicksburg case* it was pointed out that the power of the city to exclude itself from building waterworks was recognized to exist by the Supreme Court of Mississippi." A most careful examination, however, of the opinion and statement of facts in that case discloses no such conclusion or even intimation that the decision was in anywise founded on that fact. The only Mississippi law or cases referred to were *Collins* v. *Sherman,* 31 Miss. 679; *Gaines* v. *Coates,* 51 Miss. 335, and *Greenville Waterworks Co.* v. *City of Greenville,* 7 So. 409. As clearly pointed out by Mr. JUSTICE DAY, those cases only went to the extent of holding that an exclusive grant would not be presumed, that clear and express terms must be used. But even granting that such had been shown to be the law of Mississippi, it seems that it would not have been controlling. In *Wright* v. *Nagle,* at page 793. Mr. Chief Justice WAITE said: "It is true, the court below disposed of the case by deciding that the state statutes did not authorize the Inferior Court to grant Miller an exclusive right to maintain bridges within the designated limits, and that in so doing it gave construction to a state statute. It is also true that ordinarily such a construction would be conclusive on us. One exception, however, exists to this rule, and that is where the state court has been called upon to interpret the contracts of states, though they have been made in the forms of law, or by the instrumentality of a state's authorized functionaries in conformity with state legislation." See also *Jefferson Branch Bank* v. *Skelley,* 1 Black. 436; *Louisville & Nashville Railroad* v. *Barnes,* 109 U. S.

254, 257; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Douglas* v. *Kentucky*, 168 U. S. 488; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453.

It seems, then, that the only possible manner of distinguishing or reconciling the decisions in the two principal cases is on the theory that, though a contract of a city granting an exclusive right for a term of years is void to the extent of not barring the city from conferring a franchise to other parties, still there is left in that contract enough force and vitality to prevent the city from establishing a plant of its own. In other words, the court having held in the *Walla Walla case* that it was competent for a city by express contract to bar itself from competition, in cases involving such contracts as was considered in the *Vicksburg* and *Hutchinson cases* the court will hold invalid only that part which makes the contract exclusive, thus in effect severing it, retaining that which when standing alone has been held valid, and rejecting the remainder. But suppose this kind of contract were presented to the court: A franchise to a public service corporation, the city contracting not to grant a similar right to others, either not mentioning it at all, or expressly reserving the right to establish a municipal plant. Would not the court have to hold such contract valid? There certainly would not be present the element of exclusiveness or monopoly, the ground upon which these franchises have been held invalid. And if the court would hold such contract valid, what would their holding be in another case similar to the *Vicksburg case?* In adopting this doctrine of the severability of the contract the court has adopted a rule of construction quite contrary to the trend of previous decisions, for the tendency has been to hold that the municipality has not excluded itself. In fact, there is very respectable authority for the view that even by express contract a city cannot exclude itself, there being no question of creating a monopoly involved. ELLIOTT, MUNIC. CORPS., § 148; DILLON, MUNIC. CORPS., § 97, and cases cited.

R. W. A.

POLICE REGULATION OF SLEEPING CAR BERTHS.—From the time of the introduction of the sleeping car there has been a constant feud between the sleeping car companies and the travelling public in regard to the upper berths. The exigencies of the situation have, of course, made economy of space a prime requisite in sleeping car construction, and there is no doubt but that a high degree of success in this respect has attended the efforts of the sleeping car builders. The public has usually been tolerant enough of the close quarters assigned to it, when crowding has seemed necessary to accommodate the travellers applying for sleeping car space, but it has never been quite clear to the average traveller why he should be forced to practice the arts of the contortionist at the risk of breaking his head against the upper berth when no one occupied or wanted that upper berth. He has usually assumed that the company's regulation in regard to unoccupied upper berths has been designed to force him to buy an entire section if he wished head-room enough to make a lower berth comfortable.